BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC. A-R CABLE PARTNERS CABLEVISION OF FRAMINGHAM, INC. CHARTER COMMUNICATIONS GREATER WORCESTER CABLEVISION, INC. MEDIAONE OF MASSACHUSETTS, INC. MEDIAONE OF PIONEER VALLEY, INC. MEDIAONE OF SOUTHERN NEW ENGLAND, INC. MEDIAONE OF WESTERN NEW ENGLAND, INC. MEDIAONE ENTERPRISES, INC. MEDIAONE OF NEW ENGLAND, INC. PEGASUS COMMUNICATIONS TIME WARNER CABLE *Complainants*, v. MASSACHUSETTS ELECTRIC COMPANY *Respondent*.	D.T.E. 98-52

Direct Testimony and Exhibits of

PAUL GLIST

Witness for Complainants

July 10, 1998

78079.1

Qualifications and Charge

Q. Please state your name, position and business address, and summarize your qualifications as an expert witness regarding pole attachment matters.

A. My name is Paul Glist. I am a partner with the law firm of Cole, Raywid & Braverman, L.L.P., located at 1919 Pennsylvania Avenue, N.W., Washington, D.C. 20006. I have specialized in cable television and communications law since 1978. I have analyzed pole attachment rates, terms and conditions since 1978, in connection with pole attachment ratemaking; in rulemakings and adjudications at the FCC and before State public utility commissions; and in reviewing courts. I have served as a faculty member of the Practicing Law Institute for over 10 years, where I teach cable regulation, pole attachments, and other related fields. In the field of pole attachments in particular, I have served as counsel to the cable operator or CLEC in the majority of all complaint cases filed since 1978 at the FCC. I have participated extensively in each of the rulemakings and request for rulemakings which the Federal Communications Commission ("FCC") has undertaken, including CC Docket 78-144, the original rulemaking; RM-4558, the reexamination of useable space; CC Docket 86-212, fine-tuning of carrying charges; Part 31 to Part 32 conversion; CS Docket 96-166, extending the rules to CLECs; CC Docket 96-98, access to poles; CS Docket 97-98, fine-tuning of carrying charges; CS Docket 97-151, the rate for telecommunications carriers after 2001. I have participated in each of the appeals incident to these rulemakings. I have also participated, either as outside advisor, trial counsel or a witness, at pole attachment rulemakings and complaint proceedings before State utility commissions, including California, New York, Michigan, and Massachusetts. I have served as outside rate analyst for cable systems and for state cable television associations in reviewing and negotiating pole rates in many more states for more than 10 years. I have also served as counsel to the National Cable

Television Association in various pole matters, including the development of the language and formula in the 1996 Telecommunications Act pole attachment provisions. My CV is submitted as Exhibit PG-1.

Q. On whose behalf is this testimony being presented?

A. This testimony is offered on behalf of the cable operator Complainants in this action, A-R Cable Services, Inc., Cablevision of Framingham, Inc., Charter Communications, Greater Worcester Cablevision, Inc., MediaOne of Massachusetts, Inc., MediaOne of Pioneer Valley, Inc., MediaOne of Southern New England, Inc., MediaOne of Western New England, Inc., MediaOne Enterprises, Inc., MediaOne of New England, Inc., Pegasus Communications and Time Warner Cable.

Q. Have you previously testified in other pole attachment proceedings?

A. Yes, I testified as an expert witness on pole attachments before the Massachusetts Department of Public Utilities or Massachusetts Department of Telecommunications and Energy (Department) in *A-R Cable Services, Inc., et al. v. Boston Edison*, DTE 97-82, decided on April 15, 1998 (*A-R Cable Services*).

Q. Are you familiar with the regulatory framework regarding pole attachments in Massachusetts?

A. Yes, I am very familiar with this framework. I have reviewed the pertinent Massachusetts statute, G.L. c. 166, § 25A, the applicable regulations promulgated by the Department under this authority, 220 C.M.R. §§ 45.01 - 45.09, and pertinent Massachusetts case law, including

the *Greater Media*[1] and *A-R Cable Services* cases.

Q. Mr. Glist, what was your assignment in this proceeding?

A. I have been asked to analyze the pole rent methodology employed by Massachusetts Electric Company ("Massachusetts Electric") in support of its pole attachment rate increase.

Q. Do you need to qualify your testimony in any way?

A. Yes, in two respects. Massachusetts Electric has not yet fully responded to discovery, and it changed its position on certain factual matters as this case has developed. There may be a need to revisit the issues as discovery is completed and if Massachusetts Electric changes its position on the facts or is permitted to modify its original rate justification.

Summary of Testimony

Q. Please summarize the testimony that you will be presenting before the Department at this time.

A. In *A-R Cable Services*, the Department adopted the FCC formula for calculating "fully allocated costs," which serve as the upper end of reasonable pole attachment rates under G.L. c. 166, §25A. This formula calculates the annual carrying costs of a bare pole, and then allocates those costs to cable in the ratio of pole space used compared with useable pole space.

[1] *Greater Media, Inc.*, D.P.U. 91-218 (1992), *affirmed, Greater Media, Inc. v. DPU*, 415 Mass. 409 (1993).

Massachusetts Electric has not correctly applied the FCC formula, as adopted by the Department. Massachusetts Electric makes many material missteps in its rate calculation which serve to inflate the rate above that properly computed from Massachusetts Electric's own data. My testimony explains the proper application of the Department's formula. I also walk step-by-step through Massachusetts Electric's errors and show how to correct them, and to derive a properly calculated rate of $9.08 for solely owned poles (50% of that, or $4.54, for jointly owned poles).

First, Massachusetts Electric miscalculates useable space by excluding 5 inches of allegedly unusable pole top and 40 inches of separation space between electric and communications lines. Both the FCC and Department formulas recognize that pole top is useable, in part due to the use and availability of pole top extenders and pole pins which allow the placement of electric lines well above the top of the pole. Likewise, the Department and FCC formulas both treat all space above minimum grade, including the "neutral zone," as useable space, for reasons copiously documented in FCC and State PSC rulemaking records. This has been repeatedly reaffirmed by the FCC, by reviewing courts, and by Congress. It is a regulatory classification which follows from electric utility use of the "neutral zone" which allows some separation of electric secondary lines from many communications lines; from the fact that cable operators pay to create that space when it is not already there; and from the need for such space for electric utilities to meet their own clearance requirements. It is also consistent with broader aspects of the formula, which reflects that the space used by cable on poles is pure surplus; that Massachusetts Electric collects all costs which are caused by cable operators up front, in advance, at the time of attachment, in the form of non-recurring "makeready" assessments; that aerial cable television facilities occupy the least amount of pole space, are by far the lightest conductors on the pole as compared to power and telephone facilities, and do not change the characteristics of the pole to which they attach; and that cable

operators are afforded clearly inferior and subordinate rights in their attachments, as compared with pole owners and joint users. What Massachusetts Electric is really trying to do is to fundamentally change the FCC and Department formulas so that the carrying costs of a 37.5-foot pole are allocated 1/9 to cable, rather than 1/13.5. This effectively changes the rule itself to allocate 50% more costs to cable on a pole jointly owned by Massachusetts Electric and Bell Atlantic than on a pole jointly owned by Boston Edison and Bell Atlantic. But Massachusetts Electric has offered up nothing about the poles it owns which distinguish them in such a fundamental way from the typical pole used by others in the utility business. As explained later in my testimony, Massachusetts Electric has disguised its erroneous alteration of the FCC's and the Department's formula as an attempt to overcome the useable space rebuttable presumption.

Although Massachusetts Electric has not properly rebutted the useable space factor of 1/13.5, it is possible to derive a reasonably accurate useable space figure of 1/12.8246 from the cable-only pole data it presented in pre-complaint negotiations and with its Response, if we adjust the pole top and neutral zone to conform with the FCC formula. If the Department elects to depart from the *A-R Cable Services* formula rebuttable presumptions based upon the availability of internal utility data which it deems sufficient to rebut those presumptions, then the Department would adopt the 1/12.8246 useable space ratio.

Second, Massachusetts Electric has not properly calculated the net cost of a bare pole. The rental is supposed to be charged on the carrying costs of a bare pole, but those costs are contained within the larger account 364, which also covers crossarms, secondary racks used for electrical lines, transformer cluster mounts, pole top pins and pole top extenders brackets, substation fences and other "appurtenances" germane to electric services which must be removed from net pole investment. The Department's formula presumes that 15% of this

account is appurtenances, but Massachusetts Electric's own data shows that 26% of its Account 364 reflects crossarms and other appurtenances. As under the FCC formula, 26% should be used in calculating the net investment per bare pole on which the rental is calculated, given the availability of Massachusetts Electric accounting records that rebut the 15% presumption for appurtenance investment in Account 364.

Third, Massachusetts Electric impermissibly has departed from the standard calculation of accumulated deferred taxes by making a ratemaking adjustment for SFAS-109. This is not permitted under the standard methodology, and should have no place in pole attachment accounting where a normal level of deferrals and reversals of deferrals is reflected each year as the pole rates are annually updated. The current formula obviates the need for tax forecasting and for the need to assure that all related items were adjusted and properly reflected on the Company's books, including construction work in progress (CWIP), allowance for funds used during construction (AFUDC), projected changes in tax law rates, and reported balances of plant in service.

Massachusetts Electric has reduced the number of poles in its Continuing Property Report (CPR). We will accept the equivalent pole count set forth in their Response.

Massachusetts Electric has adjusted the allocator used to apportion accumulated depreciation reserve for distribution plant to poles, by removing from the denominator of the allocator the investment it has in non-depreciable land and land rights. While we do not object to reducing the rent in this manner, this method is not one which has been approved by the FCC or Department, and we have given Massachusetts Electric the benefit of the FCC formula, even when it produces a slightly higher rent than might be derived through a somewhat more complex calculation.

These adjustments would create a straightforward calculation offering many administrative efficiencies, while assuring a fair rent consistent with the FCC formula and the *A-R Cable Services* decision.

Massachusetts Electric seems also to claim that by signing pole contracts with affixed appendices containing the unlawful rate, two of the multiple Complainants may have waived recourse to the Department. If this is what Massachusetts Electric is saying, the Department should reject the claim as a matter of law, as has the FCC and the Department have done on prior occasions. Accepting such claims would invite a subversion of the Department's jurisdiction. In any event, the Complaint clearly sets out that these parties protested the rates as unreasonable and turned the rate negotiation with all NEES utilities over to the New England Cable Television Association, Inc. (NECTA). Their independent efforts to resolve contract problems (which I understand were the utilities' efforts to impose overlashing restrictions and an effort to consolidate three separate MediaOne agreements with NEES affiliates into a single agreement) had nothing to do with the disputed rate.

Factual Background

Q. Why do cable operators attach their facilities to Massachusetts Electric poles?

A. Almost all poles in Massachusetts Electric's electric distribution franchise to which aerial facilities may be attached are owned by Massachusetts Electric or Bell Atlantic. These are respectively the electric and telephone utilities serving the cable franchise areas at issue in this case. This is consistent with arrangements throughout the nation. Zoning, environmental, municipal ordinance and financial constraints make it impractical for any third party to install redundant pole plant along municipal rights of way and through residential yards. In any

given area, there is only one provider of pole space, usually the electric company or the telephone company, by virtue of these utilities entering into joint pole agreements. There is surplus space on those existing poles. The utilities typically have rights-of-way and easements to place poles granted by governmental authorities. The social, aesthetic, and other costs of duplicative pole lines have long been avoided by requiring cable operators to use preexisting poles for attachment. The cable operator Complainants therefore attach their cable television lines to the Massachusetts Electric and Bell Atlantic poles, which also support these utilities' electrical lines and telephone lines.

Q. How many poles are involved?

A. The Complainants attach facilities to approximately 17,000 poles which are solely-owned by Massachusetts Electric, and attach facilities to approximately 300,000 poles jointly-owned by Massachusetts Electric and Bell Atlantic. [2]

Q. Can you describe the conventional arrangements for "pole attachments."

A. Poles come in standard lengths in 5-foot increments, such as 30, 35, 40 or 45 feet. They are placed along public rights-of-way and easements and act as support structures for utility distribution facilities. In a typical pole arrangement the facilities of each party are placed in a defined location. At the top of the pole, electrical primary and secondary circuits are located. The horizontal piece is known as a "crossarm," and is used to place electrical lines. One may also find a vertical attachment at the very top, called a pole top pin or pole top extender, which is a vertical piece of hardware (or wood) which is used to install electrical lines above

[2] Massachusetts Electric Response to Discovery Request CABLE-6.

the top of the pole. Below the electrical lines one often finds streetlight brackets. Incumbent telephone lines are located at the bottom of the pole. Cable system lines are placed 12 inches above telephone, and (usually) 40 inches below power, in between telephone and electrical lines. Fire alarm attachments typically are placed above cable system lines. *See* Exhibit PG-2, diagrams illustrating the conventional arrangement for pole attachments.

Q. Is this pattern followed by Massachusetts Electric?

A. With respect to the placement of electric, telephone and unaffiliated cable operator attachments, that appears to have been Massachusetts Electric's general practice.

Q. Please describe Massachusetts Electric's pole attachment rates.

A. Under the terms of the license agreements between Massachusetts cable operators and Massachusetts Electric, Massachusetts Electric has been charging an annual per-pole rental rate in the amount of $9.40 for attachments to poles solely-owned by Massachusetts Electric and 50% of this amount, or $4.70, for attachments to poles jointly-owned by Massachusetts Electric and Bell Atlantic. Bell Atlantic is paid a separate pole attachment fee for attachments to jointly-owned poles, which is equal to 50% of Bell Atlantic's solely-owned pole attachment fee.

On November 20, 1997, Massachusetts Electric representatives notified cable operator Complainants in writing of their plan to increase their annual pole attachment rate. [3] Under the plan, Massachusetts Electric would increase its existing SO pole attachment rate by 40.5%

[3] *See* Complaint ¶21.

from $9.40 to $15.81 and its existing JO pole attachment rate from $4.70 to $7.91, effective as of February 1, 1998. Complainants protested Massachusetts Electric's proposed increase in its pole attachment rates as they did in connection with NEES's last proposed rate increase in the mid-1990s. Complainants designated the New England Cable Television Association, Inc. (NECTA) as their agent for purposes of confidential negotiations with Massachusetts Electric. NECTA is a trade association that represents the interests of its members, cable systems operating in the New England area, including Massachusetts.

Q. What happened after that announcement?

A. It is my understanding that NECTA on behalf of the Complainants has attempted since late 1997 to resolve this matter through negotiations with Massachusetts Electric. At various junctures, commencing on December 31, 1997, the parties entered into letter agreements to delay the date by which the Complainants would be obligated to file a complaint with the Department regarding the proposed pole rate increase. In a letter agreement dated March 20, 1998, the parties memorialized the billing arrangements and set February 1, 1998 as the effective date for any rate changes. *See* Exhibit PG-3. The last of the extensions expired on May 15, 1998, the date of the Complaint filed in this proceeding.

Calculation of the Maximum Pole Attachment Rate

Q. Can you describe your overall approach in assessing the pole rents proposed by Massachusetts Electric?

A. Earlier this year this Department concluded the *A-R Cable Services* case, in which it decided to apply the pole rent formula under G.L. c. 166, § 25A and its applicable regulations in the

same manner in which the Federal Communications Commission applies "the FCC formula" under Section 224 of the Communications Act. Thus, what I have done is to focus on the upper end of the range of rates which are permissible under the *A-R Cable Services* decision, the fully allocated rate.

Q. How is that calculated?

A. Using publicly-reported data, usually the FERC Form 1 in the case of electric companies, the first step is to calculate the utility's average net cost per bare pole. This figure is generated by taking the gross investment in pole plant, less the depreciation reserve for poles, less accumulated deferred taxes. This net figure is then reduced further by deducting the value of pole appurtenances from which cable operators derive no benefit (*e.g.*, cross-arms). This figure then is divided by the statewide total of poles in service to produce a per bare pole net cost. The next step is to calculate the carrying charges -- maintenance expense, depreciation expense, administrative expense, taxes, and overall return -- expressed as percentages of expenses to plant in service, and multiplying the sum of the carrying charges by the net cost per bare pole. This produces an annual carrying cost per pole. Finally, the Department, like the FCC, has determined that under G.L. c. 166, § 25A cable should pay only for a *pro rata* percentage of the pole plant it actually uses. Thus, the annual carrying cost is in turn multiplied by the so-called "use ratio," which is the proportion which the one foot occupied by cable bears to the "useable space" on the utility pole. Based on extensive analysis, the FCC made a rebuttable presumption that the average height of a pole with cable television attachments is 37.5 feet and that the average useable space on a utility pole with cable television attachments is 13.5 feet. The FCC has estimated that cable facilities occupy approximately 1 foot of that total useable space (even though in reality cable attachments on average occupy considerably less). Therefore, cable operators presumptively bear 1/13.5, or

7.41%, of the costs of the useable space and of the nonuseable space. This is the use ratio which the Department adopted in the *A-R Cable Services* case.

Q. Is Massachusetts Electric's proposed rate consistent with the Department's formula?

A. In a number of respects, no. There are a significant number of steps in which Massachusetts Electric has not properly calculated the costs or rate. The proper methodology is set forth in *A-R Cable Services* decision. Exhibit PG-4 sets forth Massachusetts Electric's calculation, along with side-by-side comparisons which I will walk through to show the departures which Massachusetts Electric has taken from the standard FCC methodology. I should note that Massachusetts Electric's rate development is identical to the rate development NEES is seeking to defend in affidavits attached to pleadings filed at the Federal Communications Commissions in parallel cases [4] for its commonly-owned companies, Granite State (in New Hampshire) and Narragansett Electric (in Rhode Island). In order to get to the key issues in dispute, I am taking the liberty in my testimony to not just explain cable operator Complainants' position, but to explain what I think are failings of the position of Massachusetts Electric.

Net Investment Per Pole

Q. Please start with the net investment.

A. Massachusetts Electric made three mistakes. First, Massachusetts Electric has removed too

[4] *New England Cable Television Association, Inc., et al. v. Granite State Electric Co.*, PA 98-5 (Complaint filed May 15, 1998); *New England Cable Television Association, Inc., et al. v. The Narragansett Electric Co.*, PA 98-6 (Complaint filed May 15, 1998).

little of net investment to account for the "appurtenances" such as cross arms which are booked into Account 364 but which are not useful for pole attachments. Massachusetts Electric removed 15% from net investment to account for appurtenances. This comports with the FCC's default percentage for pole appurtenances (*i.e.*, those items from which cable operators derive no benefit, such as cross-arms) for electric utilities. In pleadings at the FCC, and in discovery in this case, Massachusetts Electric and its sister companies appear to believe that 15% and only 15% may be used as the portion of Account 364 attributable to appurtenances. But this is not the case. The FCC always has held, just as the FCC's useable space presumption may be adjusted to account for a universe of shorter than average poles, the 15% appurtenance reduction is a presumption which may be adjusted to reflect actual data. As the FCC explained in adopting the current codification of the rules: "These ratios shall be rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances." *Amendment of Rules and Policies*, CC Docket 87-209, 2 FCC Rcd. 4387 ¶19 (1987). An example of that involved a New England utility. In a case involving Public Service Co. of New Hampshire and New England Telephone, the FCC used a figure of 65.54% of Account 364 to represent bare poles, thus, determining that 34.46% constituted excludable appurtenances.[5] The Account 364 itemization provided by Massachusetts Electric shows investments broken down by poles, by height, distinguishing sole from joint ownership and the various appurtenances. I divided the investments between "poles" and "appurtenances," as I have shown in Exhibit PG-4. From NEES's construction manual, I have excerpted some illustrations of most of these appurtenances. Exhibit PG-5. Crossarms, pole arms, and secondary racks are used for electrical lines only. Transformer cluster mounts are also used

[5] *Teleprompter Corp. v. New England Telephone & Telegraph Co.* and *Public Service Co. of New Hampshire*, PA-79-0044, Mimeo No. 002016 (July 14, 1981), *modified in part*, 56 R.R.2d 298 (1984).

only for electrical power. Fences and concrete associated with substation construction is used in serving electrical customers, but not for providing third party attachments. Pole top pins and pole top extenders are used for attaching electrical lines. There is sometimes a debate as to whether utility guys and anchors should be treated as structurally part of the bare pole or structurally part of the lines, but to be very conservative and reduce controversy I have simply treated them all as part of "pole" investment, even though cable operators do install their own guys to offset their own line load. Thus, the actual amount of poles, guys and anchors in Account 364 is approximately 74%, with a corresponding appurtenance investment data of approximately 26%.[6] Therefore, I have used this 26% figure in my calculations, which I have factored down for depreciation and accumulated deferred taxes in the Account 364. The result is the removal of $39 million in net appurtenances from net Account 364 investment.

Q. What was Massachusetts Electric's second error?

A. Second, Massachusetts Electric is not looking to the proper universe of poles for determining its net investment. Under the standard approach, the net investment is calculated by spreading the aggregate net investment in all distribution poles (Account 364) across all distribution pole units. In my original calculation attached to the complaint, I used a figure of 339,526 pole equivalents, which appeared to be the total number of pole units in Massachusetts Electric's continuing property records. In subsequent pleadings and affidavits, Massachusetts Electric has said that 4,040 of "Other" poles in these CPR records actually are empty locations or rented poles. (This is what it told the FCC and this Department in its Response. Later in discovery Massachusetts Electric seems to say that they are empty locations. [7]). While it is not

[6] Exhibit PG-4.

[7] Massachusetts Electric Response to Discovery Request CABLE-6.

clear that Massachusetts Electric is looking to the proper universe of poles, to reduce controversy, I have used the equivalent pole count Massachusetts Electric offers in its Response. Thus, the total number of pole equivalents in Account 364 is 335,486.

Q. For the record, what is a pole equivalent?

A. As I mentioned earlier, Massachusetts Electric jointly owns most of its poles with NET. Under its current joint ownership agreement with Bell Atlantic, Massachusetts Electric is only responsible for 50% of the joint pole. The customary and usual means for apportioning rents in New England for jointly-owned (JO) poles is to take two steps. First, one first calculates a rate for a pole solely owned by each of the joint owners. Because the investment in solely-owned (SO) poles and jointly-owned poles is commingled in the Account 364 investment total, one usually adds 50% of the total number of JO poles to 100% of the number of SO poles, to obtain a "pole equivalent" figure. When this is divided into the Account 364 investment in bare poles, the resulting figure represents the equivalent of investment in a solely-owned pole. Next, one factors down that rental so that each owner is paid a proportionate share of that rent on joint poles, equal to its proportionate ownership interest. Thus, if a pole was half owned by power and half by telephone, power would get half of its rent for a solely-owned pole and telephone would get half of its rent for a solely-owned pole. Massachusetts Electric's SO rent would be reduced by 50% to obtain its rental for a JO pole.

Q. Has Massachusetts Electric followed this method?

A. Until discovery, it had attempted to. In discovery, Massachusetts Electric began to reverse course, suggesting that it should start removing additional poles. I will await Massachusetts Electric's testimony in this case to see where it goes.

Q. What is the third error?

A. Massachusetts Electric has erroneously accounted for accumulated depreciation and accumulated deferred taxes, which I will discuss in detail in connection with carrying charges.

Q. What is the total effect of these differences in net investment development?

A. Massachusetts Electric has developed a rate with a rounded up investment figure of $377. The standard method yields a net cost of $323.72 for all poles. [8]

Carrying Charges

Q. How are carrying charges to be computed under the standard method?

A. For the maintenance component of the carrying charges, Account 593 records maintenance expenses for poles, conductors, and services. One compares Account 593 with the distribution plant to which it relates -- poles (Account 364), conductors (Account 365) and services (Account 369). One then assigns that proportionate charge to net poles. My calculation yields 6.14%.

Q. How does one compute the depreciation component of carrying charges?

A. With respect to depreciation, the standard methodology begins with the permitted depreciation rate for poles. In the Complaint, I used a figure of 4.00%. The standard method

[8] Exhibit PG-4, Line 8.

assumes that the depreciation factor has been prescribed for application to gross, and therefore grosses it up for application to net investment. My calculation yields 6.76%.

Q. How does one compute the administrative component of carrying charges?

A. The standard methodology takes the published expenses recorded in General & Administrative (Accounts 920 - 935) and compares them with the total electric plant to which they relate. It then assigns that proportionate charge to poles. The actual Accounts 920 - 935 show that administrative costs are 7.87% of net plant.

Q. How does one compute the tax component of carrying charges?

A. The standard method takes all normalized taxes from published Accounts 408.1 through 411.4 and compares them to net plant, to derive a percentage carrying charge for application to net pole investment. My calculation yields 7.77%.

Q. How does one compute the rate of return?

A. In the standard calculation, we take the overall weighted cost of capital from the last approved rate case, in this case 9.35%.

Q. How does this compare with the methodology used in *A-R Cable Services*?

A. This is the exact method adopted in that case.

Q. In deriving net plant investment figures used in calculating carrying charges, how does

Massachusetts Electric's calculation compare with the standard?

A. In deriving the net plant investment figures used in calculating carrying charges, Massachusetts Electric makes two errors which recur throughout its rate development.

Q. What is the first?

A. Massachusetts Electric has departed from the standard calculation of accumulated deferred taxes by making a ratemaking adjustment for SFAS-109. This is not permitted under the FCC or *A-R Cable Services* methodology. In addition, FERC's Chief Accountant has issued a guidance letter to all jurisdictional utilities explaining that SFAS-109 should have no ratemaking consequence. FERC, Accounting for Income Taxes, April 23, 1993 ("It is axiomatic that accounting statements issued by the FASB for use in general purpose financial statements of business entities should not, in itself, have an economic rate effect on a regulated entity or its customers."). In pole attachment accounting in particular, a normal level of deferrals and reversals of deferrals is reflected each year as the pole rates are annually updated, thus obviating the need for forecasting the long term probabilities of future tax liability, recovery from ratepayers, and estimated future tax effects of temporary differences and carryforwards, which underlie SFAS-109. If one were to effect a SFAS-109 adjustment, one would need to make certain that all other items also were adjusted, including construction work in progress (CWIP), allowance for funds used during construction (AFUDC), projected changes in tax law rates, and reported balances of plant in service. One would also need to make certain that all necessary adjustments were reflected properly on the Company books. These adjustments are often the source of controversy even among accountants. [9] While the

[9] An example from FERC is *Kentucky Utilities Company*, Docket Nos. FA96-4-000 and FA96-4-001, 78 F.E.R.C. P62,127, 1996 FERC LEXIS 2443 (Jan. 7, 1996).

Department certainly could design a pole ratemaking system which replicates a full utility rate case, this would require offsetting adjustments (*e.g*., negative working capital adjustment to reflect cable operator's payments in advance) and would defeat the purpose of having simple and expeditious pole attachment procedures. [10] This Department decided against that type of approach in *Greater Media, Inc.*, DPU 91-218 (1992) at 33,34 and recently reaffirmed its preference for a straightforward and self-executing formula to determine pole attachment fees in *A-R Cable Services*. I followed the methodology prescribed by *A-R Cable Services*, and included Accounts 190, 281-283.

Q. What is the second error committed by Massachusetts Electric in calculating carrying charges?

A. Both the Cable parties and Massachusetts Electric use the ratio of pole-to-distribution plant investment to apportion the accumulated depreciation reserve for distribution plant to poles. Massachusetts Electric offers the further refinement of removing from the denominator of the allocator the investment it has in non-depreciable land and land rights. This has the effect of increasing the amount of accumulated depreciation apportioned to poles, lowering the rate base, and lowering the pole rent by a few cents. While I do not object to reducing the rent, this method is not one which has yet been approved by the Department or FCC. I have tried to follow the FCC formula, even when it produces a slightly higher rent than might be derived through a somewhat more complex calculation, in order to keep pole proceedings on a course where the formula may be run outside of hearing and without need for routine regulatory intervention.

[10] *Nevada State Cable Television Association v. Nevada Bell*, PA 96-001, DA 98-1175 ¶17 (rel. June 18, 1998) ("We also reject Nevada Bell's modification because adjustments to one account would necessitate adjustments to other accounts and 'unduly complicate the pole attachment rate calculation process without materially increasing its accuracy.'").

Q. What is the result in the total carrying charge?

A. The standard method produces a charge of 37.89%. Massachusetts Electric derives a charge of 37.69%. Massachusetts Electric's method is not consistent with the FCC formula or the Department's formula recently applied in *A-R Cable Services*.

Massachusetts Electric Has Improperly Allocated Useable Space To Cable Attachments

Q. How should annual carrying charges be allocated to cable pole attachments in determining reasonable attachment rates?

A. Allocating pole costs according to "useable space" is premised on certain basics of the engineering of pole attachments. Every pole is set in the ground by a certain depth (typically 10% plus 2 feet) for stability. Thus, a 40-foot pole is set 6 feet in the ground. The location of lines on poles is controlled by the joint use contracts and pole license agreements, and industry usage, all of which incorporate the National Electrical Safety Code (NESC). The NESC is a national standard published by the Institute of Electrical & Electronics Engineers and followed by utilities and cable. Under the NESC, a minimum distance must be maintained above ground before the first horizontal conductor may be attached. This minimum grade clearance varies according to application. For example, the typical clearance for a communications conductor under NESC Rule 232 is 15.5 feet above grade over a highway, plus some additional space for sag, depending on the weight of the conductor and length of the span. But that clearance may be reduced to as little as 9.5 feet under differing configurations, such as alongside rural roads or in spaces or areas subject only to pedestrian traffic. Communications facilities are located at the bottom and electrical at the top of the pole, as previously discussed.

Under the standard formula, the maximum pole rate permitted is one derived by dividing a pole into "useable" space, defined as all space above minimum grade, and the "nonuseable" space. The parties are directly assigned a proportion (and cost) of "useable" space based upon their own space needs. The costs of the "nonuseable" portion of the pole, that is, the ground set and minimum grade clearance, are assigned in proportion to the assignment of direct costs. If we suppose a 40-foot pole with a 6-foot ground set and an 18-foot minimum grade clearance, the useable space would be the 40-foot overall length minus the 6-foot ground set and 18-foot minimum grade clearance, leaving 16 feet of "useable space." The direct and indirect costs of the pole would be assigned to cable in the ratio of the one foot assigned to cable to the 16 feet of useable space. Implicitly, this methodology assigns pole costs to parties in proportion to the use to which they put the useable space. The *A-R Cable Services* useable space presumption of 13.5 feet is derived from the simple average of 35-foot poles (with 11 feet of useable space) and 40-foot poles (with 16 feet of useable space). One foot divided by 13.5 is 7.41%. This figure is quite conservative and, if anything, usually *overallocates* useable space to cable operators as their attachments rarely use a full foot of pole space.

Q. Has Massachusetts Electric followed this method?

A. No. According to its documents, Massachusetts Electric has calculated the percentage of useable space attributed to cable to be 11.02%. [11] The 7.41% standard figure is a rebuttable presumption, but Massachusetts Electric's effort to rebut it contains substantial errors.

First, Massachusetts Electric incorrectly has determined that the top 0.42 feet of each pole is

[11] *See* Massachusetts Electric Response to Discovery Requests CABLE-6 and CABLE-14.

nonuseable. This space is, in fact, useable. Massachusetts Electric's position has been repeatedly rejected by the FCC in light of evidence that utilities use pole top extenders and pole top pins to make the pole top useable. [12] Just last year, the New York PSC rejected similar arguments by electric utilities. [13] In discovery, Massachusetts Electric has admitted that it makes use of pole top extenders to extend the useable space of its poles. [14] Its Construction Manual is replete with illustrations showing their use. Exhibit PG-5. Its Account 364 has over $9 million investment in pole top pins or brackets, and pole top extenders. Thus, it is clear that the top 0.42 feet of Massachusetts Electric's poles should be deemed useable.

Q. What other errors has Massachusetts Electric made?

A. Massachusetts Electric incorrectly has treated the "neutral zone" to be nonuseable space. Both the FCC and *A-R Cable Services* formula, however, considers the "neutral zone" to be useable space. In its pleadings to the FCC, NEES claims that the legislative history support for this treatment is scant and that the FCC record concerning the useability of space is stale. In fact, the FCC repeatedly has reaffirmed the formula and this treatment on copious evidence.

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[12] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, 68 F.C.C.2d 1585 (1978) (First Report and Order); 72 F.C.C.2d 59 (1979) (Memorandum Opinion and Second Report and Order); 77 F.C.C.2d 187 (1980) (Memorandum Opinion and Order); *Teleprompter Corp. v. Florida Power & Light Co.*, 49 R.R.2d 1484 (1981), *review denied*, 54 R.R.2d 1391 (1983); *Alert Cable TV of North Carolina v. Carolina Telephone & Telegraph Co.*, PA-79-0028, Mimeo No. 002015 (July 15, 1981); *American Television & Communications Corp. v. Carolina Power & Light Co.*, PA-80-0013, Mimeo No. 002011 (July 17, 1981).

[13] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n Case No. 95-C-0341 (Issued and effective June 17, 1997).

[14] Massachusetts Electric Response to Discovery Request CABLE-22.

It was reaffirmed in reconsideration of CC Docket 78-144; [15] then in the *Monongahela Power* case;[16] then again before the Commission in a 1984 rulemaking; [17] and in subsequent litigated cases.[18] The underlying record has been updated regularly, twice since passage of the 1996 Telecommunications Act in CS Docket 97-98 and CS Docket 97-151. The FCC affirmed this treatment again on February 6, 1998. *Implementation of Section 703(e) of the Telecommunications Act of 1996,* CS Docket 97-151, 11 CR 79 (1998). For its part, Congress repeatedly has reaffirmed the formula in 1983, [19] 1984,[20] 1992,[21] and 1996.[22] State pole attachment proceedings have upheld and reinforced this approach. It was reaffirmed in 1997 in Michigan and New York, [23] and again in 1998 in the decision of this Department in *A-*

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[15] *Rules for the Regulation of Cable Television Pole Attachment,* Mem. Op. and Second Report and Order, 77 F.C.C. 2d 187 (1980).

[16] *Monongahela Power Co., et al. v. FCC,* 655 F.2d 1254 (D.C. Cir. 1981).

[17] *Petition to Adopt Rules Concerning Usable Space On Utility Poles,* 56 R.R.2d 707, 710 (1984).

[18] *General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.,* PA-84-0015, Mimeo No. 2141 (Jan. 28, 1985); *El Paso Cablevision, Inc. v. Mountain States Telephone & Telegraph Co.,* 49 R.R.2d 847 (1981).

[19] Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983).

[20] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[21] Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[22] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[23] *See, e.g., In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues,* N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997); *Consumers Power Co., et al.,* Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997); *Ohio Edison Co., et al.,*

R Cable Services, DPU/DTE 97-82 (1998) to use 1/13.5.

Massachusetts Electric's claim that the space is not useable repeatedly has been discredited, as fully described in the rulemaking records at the FCC and at State PSCs. First, the neutral zone does not exist on poles used solely for cable or for cable and telephone. The neutral zone exists only for electrical attachments which must maintain a prescribed distance from all conductors of differing voltages and applications. Pole space used by a power company to maintain prescribed clearances among conductors is "used" by the power company for the unique attribute of ***its*** core services. Just as the separation space among electrical operators on the pole is deemed to belong to electric, so too must the neutral zone; it is used to separate electric facilities from conductors of differing voltages and applications. Second, the neutral zone is vertical space required by electric companies to maintain their own minimum clearances above grade. Third, the neutral zone is not "dead space" unusable for any other purpose. The neutral zone can be, and is, used for street light attachments, [24] from which electric utilities derive additional revenues. Fourth, cable operators have paid through makeready to create the neutral space when it is not already in place on joint use poles.

Q. Has Massachusetts Electric offered any reason for displacing thus settled body of authority?

A. No. I believe that Massachusetts Electric has misunderstood what it means to rebut the 7.41% presumption. The useable space presumption of 13.5 feet of useable space can be rebutted, but not in the manner in which Massachusetts Electric is trying to do so. The use ratio of

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No. 81-1171-EL-AIR (Ohio Pub. Serv. Comm'n Nov. 3, 1982); Cal. Pub. Util. Code § 767.5 (1996).

[24] *See* Exhibit PG-2 which illustrates street light attachments placed in the neutral zone.

1/13.5, contains within it the determination that useable space is all of the space above minimum grade clearance, reflecting the regulatory classifications which follow from power use of the "neutral zone," cable operators paying to create the space when it is not there, and the need for such space for power to meet its own clearance requirements as I mentioned earlier. If the average pole height for a particular utility is shorter than 37.5, or taller, then the corresponding useable space figure would change. But the classification of the neutral zone as useable space above minimum grade clearance is not a matter which may be "rebutted" through "actual data." If a 37.5-foot pole has 6 feet set and 18 feet to clearance, and yields 13.5 feet of useable space, there is no CPR or inventory which can make that pole have less space in the way in which Massachusetts Electric would have it. What Massachusetts Electric really is trying to do is to fundamentally change the FCC and *A-R Cable Services* formula so that the carrying costs of a 37.5-foot pole are allocated 1/9 to cable, rather than 1/13.5. This effectively changes the rule itself to allocate 50% more costs to cable on a pole jointly owned by Massachusetts Electric and Bell Atlantic than on a pole jointly owned by Boston Edison and NET. But Massachusetts Electric has offered up nothing about the poles it sets which distinguish them in such a fundamental way from the typical pole used by others in the utility business. And that is why such showings routinely are rejected under the FCC formula. [25]

Q. Then how is the use ratio of 1/13.5 a rebuttable presumption?

A. It is rebuttable by applying the calculation rules to a utility's actual inventory of pole heights for poles with cable attachments. Massachusetts Electric has records showing an inventory of

[25] *See, e.g., General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.*, PA-84-0015, Mimeo No. 2141 (Jan. 28, 1985); *El Paso Cablevision, Inc. v. Mountain States Telephone & Telegraph Co.*, 49 R.R.2d 847 (1981).

cable-attached poles which are slightly below 37.5 feet, [26] but it has not properly applied those calculation rules. The data it offers contains within it the elements which the Department would need to adopt a reasonably accurate use ratio from CPR records of cable-attached poles. Under FCC methodology, for example, it is possible to derive a reasonably accurate useable space figure from the data Massachusetts Electric presents, if we adjust the pole top and neutral zone to conform with the FCC formula.

Factor	Massachusetts Electric	Cable Parties
Height	36.47	36.47
Pole Top	0.42	0
Neutral Zone	3.33	0
Clearance	18	18
Set	5.647	5.647
Useable	9.07	12.8246
Use ratio	1/9.07=11.02%	1/12.8246=7.80%

If the Department decides to deviate from the 1/13.5 use ratio and 15% appurtenance investment rebuttable presumptions based upon its determination that sufficient evidence has been presented to rebut these presumptions, then it could adopt a 1/12.8246 or 7.80% use ratio.

Q. Are there other policies which support the classification of all space above minimum grade clearance as useable?

[26] Massachusetts Electric Response to Discovery Request CABLE-6; Affidavit of David M. Webster at 3 (Massachusetts Electric Response); Exhibit PG-4.

A. Yes. The use ratio of 1/13.5 (as opposed to 1/9, as Massachusetts Electric would prefer) in a broader sense also reflects the comparatively modest and subordinated use which cable makes of the poles. There are at least four aspects to cable television usage which supports the lower use ratio.

First, the space used on poles is pure surplus: under the joint use contracts, license contracts, and engineering standards under which poles are used, Massachusetts Electric lines are always at the top of the pole, and Bell Atlantic lines are always at the bottom. The height of the poles already has been determined, as a necessary component in the delivery of Massachusetts Electric and Bell Atlantic utility services, and the cost of those poles already has been incurred to deliver those services. Other attaching parties, such as cable operators, connect to surplus pole space located between these lines, or pay to create such space.

Second, Massachusetts Electric collects all costs which are caused by cable operators up front, in advance, at the time of attachment, before it even assesses the rent at issue in this case. Massachusetts Electric recovers these costs in the form of non-recurring "makeready" assessments. If a cable TV attachment would cause any costs to pole owners, such as the need for rearranging lines to maintain adequate clearance between lines, those costs are paid directly by the attaching party at time of initial attachment. If for any reason the pole is of insufficient height to accommodate the attaching party, that attaching party pays to replace the pole with a taller pole. (The pole remains the property of the utility and the attaching party pays rent.). Thus, all costs which are caused by the attaching party are directly paid up front by that attaching party, outside of the annual rental.

Third, aerial cable television facilities occupy the least amount of pole space, are by far the lightest conductors on the pole as compared to power and telephone facilities, and do not

change the characteristics of the pole to which they attach. Moreover, cable operators also attach the fewest facilities to the pole. By contrast, there are typically multiple electric conductors attached to the pole, plus transformer facilities, cross arms, guys and other apparatus attached to the pole exclusively for the benefit of the power company. Thus, while cable has accepted responsibility for one foot of a pole's useable space, it occupies considerably less and places much less of a burden on poles than do telephone and electric conductors.

Fourth, cable operators are afforded clearly inferior and subordinate rights in their attachments, as compared with pole owners and joint users. For example, the cable television operator has no definite right to any space on the pole; must pay to make poles ready for attachment; must be licensed pole by pole; and generally may be displaced if the utility pole owner decides that it needs the space. By contrast, utilities provide each other with a standard pole or normal pole with sufficient height, strength and space to accommodate the joint use of the pole by both utilities; and poles are made available for use in broad regions, rather than on a pole-by-pole basis as with cable operators. Massachusetts Electric's pole attachment agreement forces onto cable extraordinarily large, virtually limitless liability in connection with the very limited pole attachment license it is granted. [27] Massachusetts Electric's cable agreement also forces the cable operator to fully indemnify the power company for activities associated with the cable television pole attachments. [28] By contrast, a joint use agreement will

[27] *See* Complaint Exhibit 2 (Pole License Agreement between Massachusetts Electric Company, Massachusetts Cablevision Systems, Inc. and New England Telephone and Telegraph Co., Article XII (dated Sept. 2, 1983)).

[28] *See* Complaint Exhibit 2 (Pole License Agreement between Massachusetts Electric Company, Massachusetts Cablevision Systems, Inc. and New England Telephone and Telegraph Co., Article XII (dated Sept. 2, 1983)).

typically set forth a reasonable and equitable division of liabilities in particular circumstances. For example, most joint use agreements provide that each party is responsible for injuries caused solely by that party's actions, and that each party will pay for damages to its property and injuries to its employees when caused by the concurrent negligence of both parties. [29]

These are some of the broader factors which entered into the FCC's adoption of the use ratio of 1/13.5, within which is the determination that useable space is all of the space above minimum grade clearance.

If Massachusetts Electric were right and all of these conclusions are rebuttable, then there is no useable space formula in Massachusetts, and each pole case is bound for hearing rather than for the expeditious resolution which *A-R Cable Services* held in promise. The Department has modeled its conduit and pole rate methodologies in the *Greater Media* and *A-R Cable Services* case on the FCC approach. This case presents the opportunity to again ratify that formula and reinforce the Department's interest in implementing a formula which benefits from the simplicity, fairness, administrative convenience, and settled body of interpretive law which makes the FCC approach so desirable.

The Department Has Jurisdiction Over the MediaOne and Greater Media Disputes

Q. Massachusetts Electric seems to suggest that MediaOne and Greater Media have waived any objections they might raise to the pole rate increase because they signed an agreement with Massachusetts Electric containing the increased rate. How do you assess Massachusetts Electric's waiver theory?

[29] *See* Massachusetts Electric Response to Discovery Request CABLE-1 (Massachusetts Electric-Bell Atlantic Joint Ownership Agreement, Article 14(b) (dated Jan. 1, 1980)).

A. In the first place, it is not completely clear to me that is what Massachusetts Electric is telling this Department. Massachusetts Electric's sister company, Narragansett Electric, has made this explicit argument to the FCC in a parallel case, but the Response in this case is a little more vague. If Massachusetts Electric is making a waiver claim, I believe that both this Department and the FCC have rejected this theory as a matter of law. In 1978, the Commonwealth of Massachusetts adopted G.L. c. 166, Section 25A (inserted by St. 1978 c. 292, § 1), which grants the Department "broad authority" to regulate the rates, terms and conditions applicable to attachments and to determine and enforce reasonable rates, terms and conditions of poles and conduits. [30] As for the Department, it recognized in *Greater Media* that pole contracts are contracts of adhesion, and took jurisdiction to set aside the rate. [31] That decision and *A-R Cable Services* recognize that Complainants, as cable license holders under G.L. c. 166A, are obligated to provide cable television service to the public in accordance with the terms of their cable license agreements. Reasonable access to utility poles is essential to Complainants' fulfillment of their cable license regulations. In fact, license agreements frequently encourage or, in some cases, even *require* cable operators to make use of existing pole lines. Likewise, the United States Congress, [32] federal district and circuit courts, [33] the

[30] *See Greater Media, Inc. v. Dept. of Public Utils*., 415 Mass. 409 (1993).

[31] *Greater Media, Inc.*, D.P.U. 91-218.

[32] *See, e.g.*, 123 Cong. Rec. 35006 (1977) (remarks of Rep. Wirth, sponsor of Pole Attachment Law) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. 16697 (1977) (remarks of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. Rep. No. 95-580, at 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching

FCC,[34] the Department of Justice, [35] and the U.S. Supreme Court [36] all have classified utility poles and conduits as essential facilities.

This is why the FCC also has rejected utility claims that a pole contract can effect a waiver of government jurisdiction. In its initial pole attachment rulemaking, the Commission concluded

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CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. Rep. No. 95-721, at 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

[33] *See, e.g., United States v. Western Elec.*, 673 F. Supp. 525, 564 (D.D.C. 1987) (cable TV companies "do depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . ."); *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible").

[34] *See, e.g., Twixtel Technologies*, Letter from FCC Common Carrier Bureau, July 6, 1990 at 4 (basis of telco-cable cross-ownership rule is "the Commission's traditional concerns with carrier denial of access to essential poles and conduit"); *Section 214 Certificates*, 21 F.C.C. 2d 307, 323-29 (1970) (CATV systems "have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities." Telco has monopoly and "effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems"); *General Tel. Co. of California*, 13 F.C.C. 2d 448, 463 (1968) (by control over poles, telco is in a position to preclude an unaffiliated CATV system from commencing service).

[35] *See, e.g., United States v. AT&T*, Civ. No. 74-1698, Plaintiffs' First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department's cataloguing of BOC dominance of pole and conduit facilities. "The cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative").

[36] *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

that "Section 224 of the Act, and its attendant history, [recognize] the Commission's right to abrogate existing contracts . . . . [I]f we did not have such power our ability to rule on the lawfulness of contracts and to prescribe charges would be meaningless." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Docket 78-144, 72 F.C.C.2d 59, 67 (1979) (Second Report & Order). In *Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, PA-85-0005, Mimeo No. 5431 (June 28, 1985), *recon. denied*, PA-85-0005, Mimeo No. 6957 (Sept. 13, 1985), the Commission explained:

> We, however, will not decline to invoke our jurisdiction. As we read the legislative history of Section 224, a cable operator's bargaining position *vis a vis* a utility has nothing to do with its size. Instead, the unequal bargaining relationship stems from the fact that in most cases the utility enjoys a monopoly over utility poles. Moreover, the utility's poles may offer the only feasible means of installing cable.

Id. ¶4. In *TCA Management Co. v. Southwestern Public Service Co.*, 10 FCC Rcd 11832 (1995), the Commission reiterated that holding:

> In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters. To remedy the effects of that superior bargaining power, Congress gave this Commission jurisdiction to hear and resolve complaints regarding pole attachment rates. The only prerequisites to our exercise of that jurisdiction are that the company providing the pole attachments be a "utility" within Section 224's definition of that term and that no state regulate those attachments.[37]

This bedrock principle of pole regulation was reconfirmed in 1997, when the FCC held that utilities could not insist upon a waiver of Section 224 rights as a condition to pole attachments. In *Danny E. Adams, Esq.*, 12 FCC Rcd 942 (1997) the FCC held:

> Section 224, as originally enacted and as amended, acknowledges that parties in a pole attachment relationship do not have equal bargaining

[37] *Id*. ¶15 (citations omitted).

> positions, and that the potential for barriers to competitive entry emanating from the lack of access or unreasonable rates is significant . . . . .
>
> The 1996 Act also added Section 251 to the Communications Act. Section 251(b)(4) requires each local exchange carrier (LEC) "to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." Together, Sections 224 and 251 indicate a Congressional intent that access responsibilities apply to LECs in the same fashion that they do to utilities.[38]

Finally, the FCC concluded that "it is contrary to the statute for a party to be pressured, as a condition of an agreement, to waive all its legal rights and remedies provided under the law. Efforts to compel such waivers constitute impermissible attempts to subvert the Congressional intent underlying Section 224." *Id.* at 944. Thus, in my view there cannot be a waiver of this Department's jurisdiction to right an overcharge.

Q. Is there any other reason why the waiver theory does not hold up?

A. Yes. The Complaint clearly sets out that these parties protested the rate increase in writing and turned the rate negotiation with NEES over to NECTA. Their independent efforts to resolve contract problems (which I understand were NEES's effort to impose overlashing restrictions and an effort to consolidate three separate MediaOne agreements with NEES affiliates into a single agreement) had nothing to do with the disputed rate. To me, these facts are secondary, because as a policy mater no waiver should be enforced.

Q. What lesson should the DTE take from this episode in entertaining pole rate hearings?

[38] *Id*. at 943 (citations omitted).

A. Massachusetts Electric's waiver argument demonstrates just how important it is for DTE to retain authority in these proceedings. If, as Massachusetts Electric's argument requires, the DTE were to start parsing through voluminous evidence to decide such matters as the nature and extent of waivers, it would spend its energy in evidentiary hearings rather than in serving as a backstop for what should be going on: calculating straightforward numbers and rates under a clear formula that should not require evidentiary hearings except as to circumscribed disputes over whether presumptions have been rebutted as a factual matter.

Remedies for Unreasonable Pole Attachment Fees and Discriminatory Rates, Terms and Conditions

Q. You have testified that Massachusetts Electric is imposing excessive pole attachment fees. What remedies do you recommend?

A. Chapter 166, Section 25A of the Massachusetts General Laws authorizes and requires the Department to determine and enforce reasonable pole attachment rates, terms and conditions.

Q. Please describe the rate remedies which you recommend.

A. In the Complaint, cable operators requested that the Department order Massachusetts Electric to terminate its proposed rate of $15.81 per solely owned pole and $7.91 per jointly owned pole. Given my conclusions that each of these pole rates is excessive and unreasonable, I support this request for relief. Further, I recommend that the Department determine and enforce a reasonable pole attachment rate as shown in Exhibit PG-4, not exceeding $9.08 per solely-owned pole per year and $4.54 per jointly-owned pole per year ($9.56 per solely-owned pole and $4.78 per jointly-owned pole if the Department were to conclude that a 1/12.8246 useable space percentage should be applied instead of the 1/13.5 useable space

presumption.). The approved pole attachment rates should be effective as of February 1, 1998 as to each Complainant, consistent with the terms of the parties' letter agreement. Exhibit PG-3.

Q. Does this conclude your testimony?

A. Yes.

EXHIBIT PG-1

EXHIBIT PG-2

EXHIBIT PG-3

EXHIBIT PG-4

EXHIBIT PG-5

POLE PHOTOGRAPHS

Malden: Highland Avenue intersecting Diver Street

Medford: Riverside Avenue at Cummings Street, pole number 1661